IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF IDAHO

IN RE	)	
	)	
DENNIS I. GOLDBERG,	)	**Case No. 97-20673-7**
aka DENNIS GOLDBERG, M.D. ,	)	
	)	
Debtor.	)	
_____	)	
	)	
	)	
FORD ELSAESSER, Trustee,	)	**Adversary No. 98-6262**
	)	
Plaintiff,	)	**MEMORANDUM OF DECISION**
	)	**AND ORDER DENYING**
vs.	)	**MOTION FOR EXTENSION**
OF		
	)	**TIME**
JAMES A. RAEON, and PAUL W. DAUGHERTY,	)	
	)	
Defendants.	)	
_____	)	

H. James Magnuson, Couer d'Alene, Idaho, for the Plaintiff.

Theodore L. Rupp, Couer d'Alene, Idaho, for the Defendants.

Defendants James A. Raeon and Paul Daugherty have moved for an extension of time to file notice of appeal, Fed.R.Bankr.P. 8002(c), in order to make timely their appeal filed 20 days after judgment was entered herein. Having considered the arguments presented and applicable authorities, the Court concludes that the motion shall be denied.[1]

BACKGROUND

On June 29, 1999, the Court entered Judgment avoiding under § 544(a) the Defendants' liens which arose from orders entered by an Idaho state court magistrate judge. On July 19, 1999, the 20th day after the entry of judgment, Defendants' counsel filed a notice of appeal. Also on that date, Defendants filed a motion for extension of time under Rule 8002(c), seeking an extension sufficient in length to make timely that notice of appeal. [2]

Defendants' counsel admits that he wrongly believed that the Idaho Rules of Civil Procedure governed the time within which he had to file a notice of appeal. However, after reviewing the Federal Rules of Bankruptcy Procedure on the 20th day following entry of judgment and determining the actual

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[1] Plaintiff has moved the Court to dismiss the appeal as untimely. Such a motion must be presented to the appellate court, not the trial court. Rule 8011(a). Therefore, this Court must deny the Plaintiff's motion. Such a ruling is without prejudice to Plaintiff bringing such a motion before the proper court.

[2] No notice of hearing on this motion is of record. However, the matter was heard and the arguments of counsel for Plaintiff and Defendants presented on July 30.

deadline, he promptly filed the notice of appeal and the motion for extension of time. Counsel argues that his ignorance of the applicable rules falls within the scope of "excusable neglect" as contemplated by Rule 8002(c) and, thus, the Court should extend the time for filing of the notice of appeal in this case.

DISCUSSION

Fed.R.Bankr.P. 8002(a) provides that "[t]he notice of appeal shall be filed with the clerk within 10 days of the date of the entry of the judgment, order, or decree appealed from." Defendants concede that this did not occur. However, a bankruptcy judge[3] may extend the time for filing the notice of appeal, (except in regard to certain matters not at issue here). Rule 8002(c)(1).

Pursuant to 8002(c)(2):

> [a] request to extend the time for filing a notice of appeal must be made by written motion filed before the time for filing a notice of appeal has expired, except that such a motion filed not later than 20 days after the expiration of the time for filing a notice of appeal may be granted upon a showing of excusable neglect. An extension of time for filing a notice of appeal may not exceed 20 days from the expiration of the time for filing a notice of appeal otherwise prescribed by this rule or 10 days from the date of entry of the order granting the motion, whichever is later.

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[3] Thus, unlike the Plaintiff's motion to dismiss, discussed at n. 1 *supra*, the motion to extend time is properly presented to this Court for decision.

In deciding whether a party has demonstrated “excusable neglect” to support a late filing of a notice of appeal, the Court employs the standard established in *Pioneer Inv. Services Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993). *See*, *In re Cahn*, 188 B.R. 627 (9th Cir. BAP 1995) (adopting *Pioneer* for purposes of Rule 8002(c) motions.)

In *Pioneer*, the Supreme Court reasoned that the test to determine whether neglect was "excusable, . . . is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." 507 U.S. at 395. These circumstances include:

> "the danger of prejudice to the [nonmoving party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith."

Id.

The Court in *Pioneer* also recognized that, "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect" and that a party should be held accountable for the “acts and omissions of their chosen counsel.” *Pioneer*, 507 U.S. at 392, 397.

In *Cahn*, the Bankruptcy Appellate Panel found that it was not an abuse of discretion for the bankruptcy court to deny a motion to extend time to file a late appeal based on the *Pioneer* factors where the evidence showed that the

reason for the late filing of a notice of appeal was based on counsel's unfounded legal conclusions. *Cahn*, 188 B.R. at 633.

Counsel's failure to file a timely notice of appeal in this case is similar to the error in *Cahn*, and clearly amounts to "neglect" under the reasoning of *Pioneer*. The third *Pioneer* element is implicated by this failure – the reason for the delay and whether it was within the reasonable control of the movant. *Pioneer*, 507 U.S. at 395.

Defendants' counsel would have the Court weigh the other three factors. He argues that there has been no prejudice to the adverse party, that the delay was brief and without impact on this proceeding, and that there was no lack of good faith. However, the reason for the delay in this case was "within the reasonable control of the movant." *Pioneer*, 507 U.S. at 395. Furthermore, the Defendants are subject to the errors and omissions of their counsel, including ignorance of or mistakes regarding the rules. *Id.* at 392. While the delay and prejudice might be slight, and no bad faith manifest, neither *Pioneer* nor *Cahn* requires the Court to conclude that the movants should be insulated from the consequences of their counsel's actions. The Court does not find that the neglect in this case is excusable.

Other courts have also held that attorney mistake or ignorance standing alone cannot amount to excusable neglect. *In re Food Barn Stores Inc.*, 214 B.R.

197 (8th Cir. BAP 1997) (counsel's failure to review the rules to ascertain the correct date for filing the notice of appeal did not amount to excusable neglect.); *In re Silver Oaks Homes, Ltd.*,169 B.R. 349 (Bankr. D. Md. 1994). In *In re HML II, Inc.*, 234 B.R. 67 (6th Cir BAP 1999) the Court held that counsel's misreading of the Federal Rules did not amount to excusable neglect. If misreading the rules doesn't, it is hard to see how failure to read the rules could.

Courts also have observed that attorney error outweighs the other relevant circumstances. *In re Nickels*, 169 B.R. 647, 652 (Bankr. E.D. Tenn. 1994) ("[n]otwithstanding the minimal delay and prejudice resulting from counsel's failure to file Petrenko's Notice of Appeal, Petrenko's failure to meet the time requirements of Rule 8002(a) is the sort of 'neglect' that could and should have been avoided and, therefore, cannot be characterized as excusable."); *see also, In re Pyramid Energy, Ltd.*, 165 B.R. 249 (Bankr. S.D. Ill.1994).

ORDER

In light of the record presented and the authorities discussed above, the Court finds that the Defendants' failure to file a timely notice of appeal is not the result of "excusable neglect." The Defendants' motion for extension of time to file a notice of appeal shall be, and the same hereby is DENIED.

Additionally, as set forth above, the Plaintiff's Motion to Dismiss shall be and the same is also DENIED.

DATED this 11th day of August, 1999.

TERRY L. MYERS
UNITED STATES BANKRUPTCY JUDGE